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President Obama Signs FY2013 National Defense Authorization Act

January 4, 2013

On January 2, 2013, President Obama signed the $633 billion Fiscal Year 2013 National Defense Authorization Act (NDAA). As in prior years, the FY 2013 NDAA contains a host of acquisition policy and contracting-related provisions that will have a significant impact on contractors doing business with the Department of Defense (DoD). Although the House and Senate versions of the bill passed earlier this year threatened to impose several new, draconian requirements on contractors—including lowering the cap on contractor compensation and allowing the Defense Contract Audit Agency (DCAA) access to a contractor's internal audit reports—many of the most controversial contracting provisions were stripped out of the final bill.

Nevertheless, the FY 2013 NDAA contains many important new requirements and restrictions with which contractors will need to grapple. Below is a summary of the significant contracting-related provisions included in (or excluded from) the final NDAA:

- **Trafficking in persons (Sections 1701-08).** The NDAA substantially amends existing laws by directing the President to ensure that federal government contracts include a condition that authorizes the Government to take punitive action against a contractor, subcontractor, their employees, or agents if they engage in certain activities related to sex or labor trafficking. For all contracts that exceed $500,000 and are performed outside the U.S., contractors will be required to maintain a compliance plan and make annual certifications related to anti-human trafficking efforts.
- **Counterfeit electronic parts (Section 833).** Section 833 amends Section 818 of the 2012 NDAA to provide certain

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protections for contractors performing rework or corrective action to remedy the use of counterfeit electronic parts, including making the costs of such work allowable in certain conditions.

- **Cybersecurity (Section 941).** Section 941 requires DoD to establish procedures that would require certain defense contractors to report successful penetrations of their networks and information systems and allow DoD personnel to obtain access to equipment or information necessary to determine whether information was successfully extracted from the contractor's network. In response to industry objections to earlier versions of this provision because of concerns over the potential compromise of contractor proprietary information, the final NDAA includes a new requirement that DoD "provide for the reasonable protection of trade secrets, commercial or financial information, and information that can be used to identify a specific person."
- **DCAA access to contractor internal audit reports (Section 832).** Although previous versions of the legislation included provisions that would have vastly expanded DCAA's ability to access contractors' internal audit reports and materials, these provisions were substantially revised in the final language. The final NDAA ensures that DCAA cannot use contractor internal audit reports and supporting materials for purposes other than assessing risk and evaluating the efficacy of contractor internal controls and the reliability of associated contractor business systems. It also provides that while internal audit reports "may be considered" in assessing a contractor's system of internal controls, they "shall not be the sole basis" for finding a system inadequate.
- **Contractor profits (Section 804).** Section 804 requires DoD to review its profit guidelines in order to identify any necessary changes to ensure an appropriate link between contractor profit and contractor performance. The review must consider the appropriate levels of profit needed to sustain competition, contractors' assumption of risk and incentives for superior performance in delivering quality products and services in a timely and cost-effective manner.
- **Contractor employee compensation (Section 864).** Addressing a major concern for contractors, rather than tying allowability limits on contractor compensation to the salary of the Vice President, as the Senate bill would have done, the final NDAA requires the Government Accountability Office (GAO) to conduct a study on the effects reducing the allowable costs of contractor compensation.
- **Contingency contracting (Sections 841-53).** The NDAA contains a litany of provisions relating to government contracts in support of contingency operations, including several major acquisition reforms from the Comprehensive Contingency Contracting Reform Act (S. 3286) introduced by Sen. Claire McCaskill (D-Mo).
- **Small business (Sections 1631-1699).** The NDAA contains a host of provisions aimed at increasing contracting opportunities for small business. Those provisions include (i) requiring that small business prime contractors not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract, with exceptions for subcontractors that qualify as a "similarly situated entity" (Section 1651) and (ii) requiring an offeror to notify any potential subcontractors that it intends to include in its subcontracting plan and require the SBA to establish a reporting mechanism that allows a subcontractor or potential subcontractor to report "fraudulent activity or bad faith by a contractor with respect to a subcontracting plan" (Section 1653).

- **Extension of contractor conflicts of interest limitations (Section 829).** Section 829 requires DoD to review the guidance on personal conflicts of interest for contractor employees performing acquisition functions closely associated with inherently governmental functions in order to determine whether it should be extended to contractor personnel performing functions other than acquisition functions that are closely associated with inherently governmental functions, personal services contracts or contracts for staff augmentation services.

The final NDAA includes many significant new requirements and restrictions that will affect virtually every company that does business with DoD. Contractors should closely review these provisions to assess the potential impact on their business.